**COMPENSATION REVIEW BOARD**

**CRB No. 12-011 (2)**

**SPECIAL SWANSON,**
**Claimant–Petitioner,**

**v.**

**DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,**
**Employer–Respondent.**

Appeal from a Compensation Order of
Chief Administrative Law Judge George W. Crawford
AHD No. PBL 11-024, DCP No. 761032-0001-20000-005

Special Swanson, *pro se*, Petitioner
Justin Zimmerman, Esquire, for the Respondent

Before LAWRENCE D. TARR, MELISSA LIN JONES, and HENRY W. MCCOY, *Administrative Appeals Judges*.

LAWRENCE D. TARR for the Compensation Review Board:

## DECISION AND REMAND ORDER IN RESPONSE TO CLAIMANT'S REQUEST FOR RECONSIDERATION

### CLAIMANT'S REQUEST FOR RECONSIDERATION

On March 21, 2012, the Compensation Review Board (CRB) issued a decision that dismissed the Application for Review filed by Special Swanson (claimant) because it was not timely filed. The CRB's decision noted that the Compensation Order (CO) issued on December 27, 2011, and that Ms. Swanson's request for review of that order was not filed with the CRB until January 27, 2012, one day past the 30-day time limit set by D.C. Code §1-623.28.

On March 26, 2012, the claimant filed a request for reconsideration of this decision. The claimant asserted that her review request was timely because although the CO's Certificate of Service stated it was mailed on December 27, 2011, the CO's envelope was postmarked on December 28, 2011.

The employer in opposition asserts that the application for review was untimely, and the CRB is jurisdictionally barred from accepting it, because D.C. Code §1-623.28(a) provides that "An application for review …must be filed within 30 days after the date of issuance" and because 7

DCMR §258.2 states that an application for review must be filed within thirty days from the date shown on the certificate of service.

We disagree with the employer's argument. Keying the time limit for review only to the date of issuance shown in the CO's certificate of service, without regard to when the order actually was sent to the parties, could lead to unintended and unacceptable consequences. For example, consistent with the employer's argument, so long as the certificate showed some date of issuance, the 30-day period for filing for review could expire even if the hearings division inadvertently never mailed the decision to the parties. Therefore, the CO's date of issuance can not be the controlling factor in deciding the timeliness of a review request.

We believe the legislative intent of the statute is that a party has 30 days to file for review from when the decision leaves the agency. While this is presumed to be the date shown in the certificate of service, where as here, a party convincingly proves the decision was mailed on a different date, the actual date of mailing, not the false date shown on the certificate, controls the period within which review may be requested.[1]

Therefore, we find the claimant has proven her review request was timely filed and the CRB's March 12, 2012, Decision and Order is hereby VACATED.

As we shall now discuss, we must remand this matter because of what appears to be an inadvertent, but substantial, procedural error.

## BACKGROUND FACTS OF RECORD

The claimant injured her right side, right hip and lower back when she slipped and fell in the course of her employment as a correctional officer on August 27, 2000. The employer initially paid the claimant disability benefits and then stopped in May 2011, after it received a medical report from Dr. Paul Wright, who had performed an "Additional Medical Evaluation" (AME). Dr. Wright opined that that the claimant had fully recovered from her work injury.

After the claimant's request for reconsideration was denied by the employer, the claimant filed an application for formal hearing seeking reinstatement of those benefits. A formal hearing was convened on August 6, 2011 before Administrative Law Judge (ALJ) David L. Boddie at which testimony was given and documentary evidence was received.

For reasons that are not apparent from the record, at some unspecified time after the formal hearing, the case was assigned to Chief Administrative Law Judge (CALJ) George W. Crawford to write the decision. There is no statement in the CO, or any evidence in the CRB's file, that the parties were

[1] The employer alternatively argues in its Memorandum that the "issuance date" for the purposes of D.C. Code § 1-623.28 (a) is the date the ALJ made the decision, not the date of mailing. However, the employer correctly cited the case relied upon, *White v. D.C. Public Schools*, Dir. Dkt. No 03-04 (May 23, 2004), with the introductory signal "See generally" because the *White* case did not decide whether the issuance date is the date of mailing or the date of decision.

given notice of this assignment or given an opportunity to agree or object to CALJ Crawford deciding the case.

In the CO, Judge Crawford denied the claimant's request for reinstatement of her temporary total disability benefits. The clamant filed a timely Application for Review with the Compensation Review Board (CRB), to which the employer filed an opposition.

## JURISDICTION AND STANDARD OF REVIEW

Review by the CRB is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts, and the resulting order granting or denying benefits, are in accordance with applicable law. *See,* D.C. Comprehensive Merit Personnel Act of 1978, as amended, D.C. Official Code § 1-623.01, *et seq.*, at § 1-623.28 (a). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l v DOES*, 834 A.2d 882 (2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence and is otherwise in conformance with the law, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott*, 834 A.2d at 885.

## DISCUSSION

On review, the claimant made several requests, some of which (retroactive pay, health insurance, and a settlement of her case) AHD and the CRB do not have the authority to award.

One of the claimant's several assignments of error, stated on page 5 of her initial Application for Review was:

> The claimant would like to 'respectfully' share with the Review Board her concern as it relates to the changing of Judges from Judge David L. Boddie to Judge George W. Crawford. The Claimant's concern is Judge Crawford reviewed and determined the outcome of the Claimant's decision without meeting and/or giving the Claimant the opportunity to review this motion with him face-to-face as she did with Judge Boddie. With all-do-respect, the Claimant is concerned that Judge Crawford did not have enough time to give a true evaluation of this case and the information shared via documents where too inconsistent and missing too much information to make a sound and just decision.

The claimant's reference to CALJ Crawford's document-only review is an apparent reference to this footnote stated at page 8 of the CO:

> Chief Administrative Law Judge Crawford wrote this Compensation Order based exclusively upon findings of fact from the documents in the evidentiary record.

> Those documents consist of the parties' exhibits and their stipulations contained in the Pre-Hearing Order. Findings of facts relative to the witness's credibility were unnecessary.

Cases brought under the District of Columbia's Comprehensive Merit Personnel Act are to be conducted in accordance with D.C. Code §1-623.24 (A) (2). This statute states:

> In conducting the hearing, the representative of the Mayor is not bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, or by the provisions of the District of Columbia Administrative Procedure Act (D.C. Code, § 2-501 *et seq*.), except as provided by this subchapter, but may conduct the hearing in such manner as to best ascertain the rights of the claimant. For this purpose, he or she shall receive such relevant evidence as the claimant adduces and such other evidence as he or she determines necessary or useful in evaluating the claim.

In 1997, the Employee's Compensation Appeals Board (ECAB), which at that time was the administrative reviewing body for public sector workers' compensation cases, interpreted this Code section with respect to a very similar fact situation in *Andrews v. D.C. Public Schools*, ECAB No. 94-23 (August 12, 1997).

In *Andrews*, Hearing Examiner Roebuck held a formal hearing and issued a decision that recommended denying Andrews' claim for additional worker's compensation benefits. The Deputy accepted the recommendation and Andrews appealed to the ECAB. The ECAB ordered the case remanded for further review.

When the case was remanded, Hearing Examiner Roebuck no longer was employed by the agency and the case was assigned to a different Hearing Examiner. This Hearing Examiner's recommendation to deny the claim was adopted by the Deputy and the claimant appealed.

The ECAB reversed and remanded the case because the claimant was not given the choice of having a new hearing or having the new Hearing Examiner decide the case:

> It has long been established that the one who decides the case must hear the case unless the parties are given an opportunity to elect between having a new hearing or having a different Hearing Examiner decide the case. See, *Simmons v. District Unemployment Compensation Board, 292 A.2d 797 (D.C. 1972).*
>
> Since the record is devoid of any evidence that petitioner was given the opportunity to make an election, this case must be remanded to Hearing and Adjudication Section for further proceedings.

We find this decision is consistent with D.C. Code §1-623.24 and with fundamental notions of fairness and due process.

Certainly, the CALJ has the discretion to assign writing a CO to himself or to a different ALJ than the ALJ who held the formal hearing. However, when such a change is made, consistent with *Andrews*, the parties must be given notice of the change and given an opportunity to agree to the change or if they object, to have a new formal hearing before the newly-assigned judge. The parties

were not given the chance to elect between having a new hearing and having a different ALJ (or the CALJ) decided the case.

Therefore, we must remand this case so that the parties are given the chance to make an election between holding a new hearing or having a different hearing examiner (to be determined by the CALJ) decide the case.

Because the parties may choose to have a new hearing, we should comment on three other procedural matters.

First, as stated earlier, the CALJ stated he decided the case on the documents and exhibits contained in the stipulations contained in the Pre-Hearing Order and did not consider the testimony of the claimant, who was the only witness called at the formal hearing.

We do not doubt that the CALJ utilized this procedure in good faith and to foster a quicker resolution of this contested case. However, unless agreed to by the parties, deciding the case without permitting a party to present evidence at a formal hearing, or, as done here, deciding the case without considering the evidence presented at a formal hearing is inconsistent with D.C. Code §§1-623.24 (b) (1) and (2) and 7 DCMR §107.6, which state in relevant parts:

> a claimant for compensation … is entitled … to a hearing on the claim before a Department of Employment Services Disability Compensation Administrative Law Judge. At the hearing, the claimant and the Attorney General are entitled to present evidence. D.C. Code §1-623.24 (b) (1).
>
> (The hearing officer) shall receive such relevant evidence as the claimant adduces and such other evidence as he or she determines necessary or useful in evaluating the claim. D.C. Code §1-623.24 (b) (2).
>
> In conducting a hearing, evidence may be presented orally or in the form of written statements and exhibits. 7 DCMR §107.6.

Although the CO stated it was not necessary to make any credibility findings, the claimant testified that, despite medical evidence to the contrary, she still is injured and cannot perform her regular work. Therefore, the decision before the CALJ involved a credibility determination with respect to the claimant's ability to work-- whether to believe the claimant or the medical experts.

Second, on page 5 of the CO, the CALJ stated as the Standard of Review:

> The District of Columbia Court of Appeals (hereinafter "Court") reviews decisions applying the Act under the "substantial evidence" standard. *Washington Metro. Area Transit Auth. v. District of Columbia Dep't of Employment Servs.*, 926 A.2d 140, 146-47 (D.C.2007). Specifically, the Court "must determine first, whether the agency has made a finding of fact on each material contested issue of fact; second, whether the agency's findings are supported by substantial evidence on the record as a whole; and third, whether the agency's conclusions flow rationally from those findings and comport with the applicable law." *Id.* (*quoting Mills v. District of Columbia Dep't of*

> *Employment Servs.*, 838 A.2d 325, 327 (D.C.2003)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Fontenot v. District of Columbia Dep't of Employment Servs.*, 804 A.2d 1104, 1106 (D.C.2002) (*quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938)).The Court will reverse an administrative ruling only if it is "arbitrary, capricious, or otherwise an abuse of discretion and not in accordance with the law," *Landesberg v. District of Columbia Dep't of Employment Servs.*, 794 A.2d 607, 612 (D.C.2002).

The CO does not state nor indicate why it recited the standard of review that is used by the District of Columbia Court of Appeals when reviewing decisions by the CRB, rather than the preponderance of the evidence standard that is appropriate for AHD cases.

Third, the CALJ concluded at page 5:

> The Claimant did not provide evidence from any physician, treating or otherwise, to support her claim for disability benefits. Claimant has not produced evidence to prove that she continues to be disabled as a result of her August 27, 2000 work injury. The Office of Risk Management met its burden to support the termination of Claimant's temporary total disability benefits.

These statements seem to place the burden of proof on the claimant. However, once a claim for benefits has been accepted by the District of Columbia government's administrator of the Act, and has paid benefits for that claim, the burden of proof which normally rests with a claimant is shifted to the employer to present evidence that preponderates in proving those benefits should be modified or ended. *Williams v. D.C. Department of Parks and Recreation*, CRB No. 08-026, AHD No. PBL 07-029, PBL/DCP Nos. 761013-0001-2005-0007 (December 13, 2007).

## CONCLUSION AND ORDER

For the reasons stated, the Compensation Order of March 12, 2012, is VACATED. This matter is remanded to the CALJ for further proceedings consistent with this decision.

FOR THE COMPENSATION REVIEW BOARD:

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LAWRENCE D. TARR
Administrative Appeals Judge

May 3, 2012
DATE